No. 78-1917

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

RAYMOND E. TRAFELET, DAVID A. CANEL, ARCHIBALD J. CAREY, JR., and BENJAMIN NELSON, individually and on behalf of all others similarly situated; and PETER FITZPATRICK, ALBERT W. WILLIAMS, and MELVIN B. LEWIS, individually and on behalf of all others similarly situated,

Petitioners,

vs.

JAMES R. THOMPSON, as Governor of Illinois; STATE BOARD OF ELECTIONS OF THE STATE OF ILLINOIS; and JOHN W. COUNTRYMAN, as Chairman and Member, MICHAEL E. LAVELLE, as Vice Chairman and Member, and JOHN J. LANIGAN, J. PHIL GILBERT, RICHARD A. COWEN, CAROLINE R. CHAMBERLAIN, JOSHUA JOHNSON, and THERESA PETRONE, as Members of the State Board of Elections of the State of Illinois, and MICHAEL J. BAKALIS, Comptroller of the State of Illinois; ALAN J. DIXON, as Secretary of State of Illinois; ROY O. GULLEY, as Director of the Administrative Office of the Illinois Courts, (Defendants); and JOHN J. McDONNELL, LEHMAN KRAUSE, JAMES EDWARD DULL, and W. R. TODD, ALLEN HARTMAN, BRIAN B. DUFF, DAVID J. SHIELDS, JAMES A. ZAFIRATOS, ANTHONY J. BOSCO, MELVIN N. LANDAU, MICHAEL P. TOOMIN, MARVIN H. RUTTENBERG, and JAMES J. HEYDA, (Intervenors),

Respondents.

BRIEF FOR INTERVENOR-RESPONDENTS ALLEN HARTMAN, DAVID J. SHIELDS, JAMES A. ZAFIRATOS, ANTHONY J. BOSCO, AND JAMES J. HEYDA IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 594 F. 2d 623. The opinion of the district court is reproduced at A. 2a.[1]

QUESTION PRESENTED

Whether this Court should grant certiorari to review a judgment rejecting an equal protection challenge to the Illinois Compulsory Retirement of Judges Act, *Ill. Rev. Stat.*, Ch. 37, §§ 23.71, 23.72, when no substantial federal question or conflict with a decision of this or any other court is presented.

STATEMENT

In 1965, the Illinois General Assembly enacted the Illinois Compulsory Retirement of Judges Act, *Ill. Rev. Stat.*, Ch. 37, §§ 23.71, 23.72 (hereinafter "the Act"). The Act provides for the mandatory retirement of Illinois judges at age 70. The express purpose of the legislation is "to insure a more vigorous judiciary to which the public is entitled." Rept. Judicial Advisory Council of Illinois, June 1963 at 9.

The Act was specifically authorized by the 1962 amendments to the Judicial Article of the Illinois Constitution of 1870. *Ill. Const.* 1870 Article VI, §18, as amended in the referendum of November 6, 1962. These amendments established judicial retention elections, whereby judges ran unopposed for reelection and had to obtain only a 60 percent favorable vote to remain on the bench. Retention elections were intended to afford Illinois judges greater security in office and to remove partisan politics from judicial elections.

[1] References (A.) are to Petitioners' Appendix herein.

Mandatory retirement was intended to complement retention elections and to provide an orderly system, whereby vacancies were created for increased citizen competition for and assumption of judicial posts. (A. 13a) The 1970 Illinois Constitution carried these goals forward. *Ill. Const.* 1970 Article VI, § 15(a). *See* S.H.A. Constitution, Article VI, § 15, Helman and Whalen, Constitutional Commentary.

In 1978, petitioners filed this suit in the Northern District of Illinois alleging that the Act violated the Equal Protection and Due Process clauses of the Fourteenth Amendment. Intervenors, individuals who sought judicial positions that were to become vacant upon the retirement of judges pursuant to the Act, intervened to urge the constitutionality of the Act. (A. 10a) After trial, the district court held the Act constitutional, finding:

> Scientific observations since the 1940's have shown an association between age and decline in human intellectual function and personality factors during the sixth and seventh decades of life, between the ages of 65 and 75. These scientific observations had been published as of the time the Illinois General Assembly considered and enacted the Act. There was at that time, and continues to be, substantial scientific agreement about the fact of the associations which have been observed. These scientific observations sustain the retirement age of 70 for Illinois judges mandated by the Act. (A. 22a)

The Court of Appeals for the Seventh Circuit affirmed the judgment in every respect.

REASONS FOR DENYING THE WRIT

There Is No Conflict Of Decisions Or Substantial Federal Question Presented And The Decisions Below Are Correct

Petitioners' equal protection claims were disposed of by this Court in *Massachusetts Board of Retirement* v. *Murgia*,

427 U.S. 307 (1976), and, more recently, in *Vance* v. *Bradley*, ____ U.S. ____, 99 S.Ct. 939 (1979). *Murgia* held that mandatory retirement legislation is to be tested by the "relatively relaxed" rational-basis standard and found that a 50-year old mandatory retirement age for state policemen was reasonable. *Bradley* sustained a 60-year old mandatory retirement age for Foreign Service officers, holding that,

> In an equal protection case of this type ... those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the government decisionmaker. 99 S. Ct. at 950.

The Act clearly meets this test. The express purpose of the statute is "to insure a more vigorous judiciary to which the public is entitled." Rept. Judicial Advisory Council of Illinois 9-10 (June 1963). After a week's trial and lengthy expert testimony, the district court found (to no one's surprise) an association between aging and a decline in the sixth and seventh decades of life in intellectual development and personality factors that bear on the judicial function. (A 22a-23a) As the Court of Appeals noted, while the defenders of the Act were not required to establish a rationality founded on empirical proof, *see Vance* v. *Bradley*, 99 S. Ct. at 950, n.28, they nevertheless met this more rigorous standard.

Further, there is no conflict between the decisions below and the decisions of other lower courts. Indeed, the Second Circuit recently rejected an equal protection challenge to the New York 70-year mandatory judicial retirement age (a statute practically identical to the Act here) and went so far as to characterize the plaintiffs' claim as "frivolous":

> We are of the opinion that the issue of age restrictions upon the term of office of state judges is properly one for the legislative or electoral processes of the State of New York and that *the effort to clothe it in constitutional garb is frivolous. Rubino* v. *Ghezzi*, 512 F.2d 431, 433 (1975), *cert. denied*, (423 U.S. 891) (emphasis supplied).

Accord Weisbrod v. *Lynn*, 420 U.S. 940 (1975) (summary affirmance of dismissal of constitutional challenge by HUD attorney to a Federal law mandating retirement at age 70); *O'Neil* v. *Baine*, 47 U.S.L.W. 2075 (Mo. Sup. Ct. July 11, 1978) (mandatory retirement for magistrates and probate judges at age 70); *Aronstam* v. *Cushman*, 325 A.2d 361 (Vt. 1974) (supreme court and all subordinate court judges at age 70); *Nelson* v. *Miller*, 480 P.2d 467 (Utah 1971) (trial judges at age 70).

Nor does the Seventh Circuit's decision conflict with this Court's ballot access decisions in *Illinois State Board of Elections* v. *Socialist Workers Party*, ____ U.S. ____, 99 S.Ct. 983 (1979) and *Bullock* v. *Carter*, 405 U.S. 134 (1972). Those cases invoked "strict scrutiny analysis" to invalidate statutes that discriminated against discrete, identifiable minorities. Here the 70-year retirement age is a general restriction that discriminates against no insular voter minority. Indeed, if petitioners' novel analysis is correct, we doubt that the Constitution's 35-year minimum age qualification for the presidency (U.S. Const. Article II, § 1, cl. 5) or the two-term restriction (U.S. Const. Amend. XXII) could pass equal-protection muster.

Finally and signally, Illinois does not stand alone in enacting mandatory judicial retirement legislation. Forty-two states have so provided, 30 of them setting age 70 as the maximum for judicial tenure. *See* Cross-Jurisdictional Survey of Mandatory Judicial Retirement filed by Defendant-Respondents State Board of Elections (May 8, 1978). Moreover, the United States Congress has carefully examined the retirement area and has adopted the 70-year mark as the governing national mandatory retirement age.

See Age Discrimination in Employment Act Amendments of 1978, P.L. 95-256. The collective judgments of these deliberative bodies removes any doubt as to the rational foundation of the Illinois Compulsory Retirement of Judges Act.

CONCLUSION

For all the foregoing reasons, we respectfully submit that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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